

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY RAUL BARRON,

No. C 11-2797 PJH

Petitioner,

**ORDER DENYING
PETITIONER'S MOTION FOR
APPOINTMENT OF COUNSEL
AND GRANTING LEAVE TO
PROCEED IN FORMA
PAUPERIS**

vs.

MIKE STAINER, Warden,

Respondent.

On January 25, 2013, the court issued an order denying the petition for writ of habeas corpus and entered judgment against petitioner. Petitioner, who is represented, now moves for appointment of counsel and for leave to proceed in forma pauperis.

The Sixth Amendment's right to counsel does not apply in habeas corpus actions. *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, the district court has discretion to appoint counsel for a habeas petitioner when it determines "that the interests of justice so require." *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986); 18 U.S.C. § 3006A(a)(2)(B). Furthermore, 28 U.S.C. § 1915(d) confers on a district court the discretion to designate counsel to represent an indigent civil litigant only in "exceptional circumstances." *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Here, petitioner seeks appointment of counsel pursuant to 18 U.S.C. § 3006A, which provides for payment for representation, rather than appointment of pro bono counsel. *See United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, State of Wash.*, 795 F.2d 796, 801 (9th Cir. 1986) (noting that 18 U.S.C. § 3006A(d) makes a provision for paying appointed counsel, whereas "[n]o statute provides funds to pay counsel secured under 28 U.S.C. § 1915(d)").

1 In order to be entitled to appointed counsel pursuant to § 3006A, a petitioner must
2 show that the “circumstances of a particular case indicate that appointed counsel is
3 necessary to prevent due process violations.” *Chaney*, 801 F.2d at 1196. Under Ninth
4 Circuit authority, “[i]n deciding whether to appoint counsel in a habeas proceeding, the
5 district court must evaluate the likelihood of success on the merits as well as the ability of
6 the petitioner to articulate his claims pro se in light of the complexity of the legal issues
7 involved.” *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) (holding that interlocutory
8 order denying motion for appointment of habeas counsel is not appealable, noting rules
9 governing habeas “do not limit the appointment of counsel under 18 U.S.C. § 3006A at any
10 stage of the case if the interest of justice so requires”) (citing Rule 8(c), 28 U.S.C. foll.
11 § 2254).

12 Here, the court issued a certificate of appealability on petitioner’s claim that the state
13 court’s exclusion of evidence to impeach Detective Rodriguez violated the Sixth
14 Amendment right of confrontation and was not harmless error. Petitioner contends that by
15 issuing a certificate of appealability, the court determined that the appeal is potentially
16 meritorious. Mot. at 4 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Having ruled
17 on the claims presented in the habeas petition, the court determines that petitioner has not
18 shown a strong likelihood of success on the merits of his appeal, but has presented a
19 debatable claim that minimally satisfies a showing of some likelihood of success.

20 With respect to the second factor for appointment of counsel, petitioner argues that
21 the confrontation clause and harmless error issues involved in his appeal are complex, and
22 that he has little education and no legal training, making it impossible to litigate those
23 issues on appeal without the aid of counsel. Having reviewed the record, the court
24 determines that the confrontation clause issue is not particularly complex, and that when
25 petitioner appeared pro se, he did not experience difficulty in articulating his habeas claims
26 due to the complexity of the issues involved. *Wilborn*, 789 F.2d at 1331 (9th Cir. 1986)
27 (“although Wilborn may have found it difficult to articulate his claims pro se, he has neither
28 demonstrated a likelihood of success on the merits nor shown that the complexity of the

1 issues involved was sufficient to require designation of counsel"). In support of the request
2 for appointment, petitioner's habeas counsel has submitted a declaration stating that
3 continuing with unpaid representation would create a financial hardship on counsel.
4 Counsel's hardship is not, however, properly considered on a request for appointment of
5 counsel. Having considered the relevant factors, the court determines that the interests of
6 justice do not require appointment of counsel pursuant to 18 U.S.C. § 3006A(a)(2)(B). The
7 motion for appointment of counsel is **DENIED**.

8 Petitioner requests leave to proceed on appeal in forma pauperis and has provided a
9 supporting financial affidavit. The affidavit submitted by petitioner does not address every
10 detail required by Form 4 of the Appendix of Forms to the Federal Rules of Appellate
11 Procedure, and petitioner has not submitted a certified copy of his prisoner trust account for
12 the immediately preceding six-month period, as required by 28 U.S.C. § 1915(b). However,
13 the court is satisfied that petitioner has demonstrated his inability to pay or to give security
14 for fees and costs, based on his financial affidavit dated February 13, 2013, and his initial
15 application to proceed in forma pauperis and accompanying trust account statement which
16 demonstrated inability to pay the full amount of a filing fee at the time he filed his habeas
17 petition. Doc. no. 2. The court notes that the initial application to proceed in forma
18 pauperis was denied as moot because petitioner paid the five dollar filing fee applicable
19 only to habeas petitions. Doc. no. 19. For good cause shown, the motion to proceed on
20 appeal in forma pauperis is **GRANTED** pursuant to 28 U.S.C. § 1915(a)(1) and Fed. R.
21 App. P. 24(a)(1).

22
23 **IT IS SO ORDERED.**

24 Dated: March 5, 2013



PHYLLIS J. HAMILTON
United States District Judge